IN THE

JAN 27 1975

MICHAEL RODAK, JR. C

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-921

WAYNE A. STANTON, as Administrator of the Indiana State Department of Public Welfare;
MARION M. HILGER, as a member of the Indiana Board of Public Welfare;
ROBERT M. CURLESS, as a member of the Indiana Board of Public Welfare;
ARVELLA M. STANTON, as a member of the Indiana Board of Public Welfare;
ROBERT G. WATSON, JR., as a member of the Indiana Board of Public Welfare;
JAMES W. BURNETT, JR., as a member of the Indiana Board of Public Welfare;
JOHN KELLEY, as Director of the Lake County Department of Public Welfare;

Petitioners,

vs.

LOUISE BOND, individually and on behalf of her minor children;
ROSE EDWARDS, as President, New Day Welfare Rights Organization, an unincorporated association;
SARAH JUDE, as President, Gary AFDC Mothers' Organization Welfare Rights Organization, an unincorporated association;
NORMA JEAN MOORE, as President, East Chicago Welfare Rights Organization, an unincorporated association; and on behalf of all similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners, Wayne A. Stanton, as Administrator of the Indiana State Department of Public Welfare, Marion M. Hilger, as a member of the Indiana Board of Public Welfare, Robert M. Curless, as a member of the Indiana Board

of Public Welfare, Arvella M. Stanton, as a member of the Indiana Board of Public Welfare, Robert G. Watson, Jr., as a member of the Indiana Board of Public Welfare and John Kelley, as Director of the Lake County Department of Public Welfare, respectfully pray that this Court issue a writ of certiorari to review and reverse the judgment of the United States Court of Appeals for the Seventh Circuit, entered in cause number 74-1409 on October 30, 1974, affirming the judgment of the United States District Court for the Northern District of Indiana, Hammond Division (hereinafter District Court).

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has been reported at 504 F.2d 1246. A copy of said opinion may be found at pages A-7 through A-19 of the Appendix. The opinion of the District Court has not been officially reported and a copy of said opinion may be found at pages A-1 through A-6 of the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254 (1) and Rule 19 (1) (b) of the Rules of this Court, to review a decision of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit), which has decided an important question of federal law which has not been, but should be, settled by this Court.

The opinion of the Seventh Circuit was entered on October 30, 1974. This petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. Sec. 2101 (c).

QUESTIONS PRESENTED FOR REVIEW

The petitioners present the following questions for review by this Court:

1. Whether the Seventh Circuit erred in finding that 42 U.S.C. Sec. 603 (g) does not deprive the District Court of jurisdiction to order compliance with the provisions of 42 U.S.C. Sec. 1396d (a) (4) (B) and the regulations issued thereunder 45 CFR 249.10 (a) (3).

STATUTORY PROVISIONS INVOLVED

The statutory provisions relied upon are 42 U.S.C. Sec. 1396d (a) (4) (B) and the regulations issued thereunder 45 CFR 249.10 (a) (3) and 42 U.S.C. Sec. 603 (f) and (g) which are appended in the Appendix at pages A-20 through A-28.

STATEMENT OF THE CASE

I.

Relevant Facts

Pursuant to 42 U.S.C. Sec. 601 the United States Congress appropriated moneys to enable the States to provide assistance for dependent needy children. The State of Indiana accepted these moneys and enacted an assistance program to give aid to families with dependent children. See I.C. 1971, 12-1-7-1 *et. seq.* Pursuant to 42 U.S.C. Sec. 1396 the United States Congress appropriated moneys for the purpose of enabling the States to furnish medical assistance on behalf of families with dependent children. 42 U.S.C. Sec. 1396a (10) provided that the

State must, in accepting a medical assistance program, provide assistance to all individuals receiving aid to families with dependent children assistance. The State of Indiana accepted these provisions and enacted a Medicaid statute providing medical assistance to children in families with dependent children under the age of twenty-one (21). See I.C. 1971, 12-1-7-15 (a) (1) and (5) and the sections following I.C. 1971, 12-1-7-15. 42 U.S.C. Sec. 1396d (i) defines medical assistance as the payment of all or part of the cost of specified care and services for, among others, individuals under the age of twenty-one (21). The specified care and services are defined in 42 U.S.C. Sec. 1396d (a) (1) through (15). Subparagraph (4) (B) of 42 U.S.C. Sec. 1396d requires the provision of the following medical services:

> . . . (4) (B) effective July 1, 1969, such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary;

45 C.F.R. Sec. 249.10 was enacted under the provisions of 42 U.S.C. Sec. 1396d and defines the requirements for State plans in the services and payment in medical assistance programs. Under 45 C.F.R. Sec. 249.10 (a) (1) the State plan for medical assistance must include the first five categories under Sec. 249.10 (b). Subparagraph (4) (ii) of Sec. 249.10 requires the State to have an Early and Periodic Screening and Diagnoses (EPSDT) program and reads as follows:

> . . . . (ii) Early and periodic screening and diagnosis of individuals under 21 years of age, and treatment

> of conditions found. Early and periodic screening and diagnosis of individuals under the age of 21 who are eligible under the plan to ascertain their physical or mental defects, and health care, treatment, and other measures to correct or ameliorate defects and chronic conditions discovered thereby. Federal financial participation is available for any item of medical or remedical care and services included under this section for individuals under the age of 21. Such care and services may be provided under the plan to individuals under the age of 21, even if such care and services are not provided, or are provided in lesser amount, duration or scope to individuals 21 years of age or older.

Further, 45 C.F.R. Sec. 249.10 (a) (3) provides that in carrying out this EPSDT program the State must provide as follows:

> . . . . (3) In carrying out the requirements in subparagraphs (1) and (2) of this paragraph with respect to the item of care set forth in paragraph (b) (4) (ii) of this section, provide:
>
> (i) For establishment of administrative mechanisms to identify available screening and diagnostic facilities, to assure that individuals under 21 years of age who are eligible for medical assistance may receive the services of such facilities, and to make available such services as may be included under the State plan;
>
> (ii) For identification of those eligible individuals who are in need of medical or remedial care and services furnished through the title V grantees, and for assuring that such individuals are informed of such services and are referred to title V grantees for care and services, as appropriate;
>
> (iii) For agreements to assure maximum utilization of existing screening, diagnostic, and treatment services provided by other public and voluntary agencies

such as child health clinics, OEO Neighborhood Health Centers, day care centers, nursery schools, school health programs, family planning clinics, maternity clinics, and similar facilities;

(iv) That early and periodic screening and diagnosis to ascertain physical and mental defects, and treatment of conditions discovered within the limits of the State plan on the amount, duration, and scope of care and services, will be available to all eligible individuals under 21 years of age; and that, in addition, eyeglasses, hearing aids, and other kinds of treatment for visual and hearing defects, and at least such dental care as is necessary for relief of pain and infection and for restoration of teeth and maintenance of dental health, will be available, whether or not otherwise included under the State plan, subject, however, to such utilization controls as may be imposed by the State agency. If such screening, diagnosis, and such additional treatment are not available by the effective date of these regulations to all eligible individuals under 21 years of age, the State plan must provide that screening, diagnosis, and such additional treatment will be available to all eligible children under 6 years of age, and must specify the progressive stages by which screening, diagnosis, and such additional treatment will be available to all eligible individuals under 21 no later than July 1, 1973.

Congress further expanded the EPSDT program by including a specific remedy for the State's failure to institute an acceptable EPSDT program. 42 U.S.C. Sec. 603 provides for the financing of the State's Aid to Families with Dependent Children (AFDC) Program. The specific penalty is codified under Section (g) of 42 U.S.C. Sec. 603 and provides for a reduction of one percent of Aid to Families with Dependent children funds if the State fails to institute an acceptable EPSDT program.

Plaintiffs filed their Complaint in this cause alleging that Indiana's EPSDT program was unacceptable under the above-cited federal laws and regulations and sought an injunction mandating the State to institute an acceptable EPSDT program.

II.

The Case In the District Court

This petition arises from an opinion issued on October 30, 1974 by the Seventh Circuit affirming the decision of the District Court.

The original lawsuit was commenced on July 23, 1973 when respondents filed a complaint in the United States District Court for the Northern Division of Indiana, Hammond Division, which was assigned cause number 73-H-184. The action by respondents was brought pursuant to 42 U.S.C. Sec. 1983, 28 U.S.C. Sec. 1342 (3) and (4), 28 U.S.C. Sec. 2201, 28 U.S.C. Sec. 2202 and 28 U.S.C. Sec. 1331. The cause was decided on cross motions for Summary Judgment filed both by Plaintiffs Louise Bond, Rose Edwards, Sarah Jude and Norma Jean Moore and by Defendants Wayne A. Stanton, Marion M. Hilger, Robert M. Curless, Arvella M. Stanton, Robert C. Watson, Jr., James W. Burnett, Jr., and John Kelley.

On March 22, 1974 the District Court issued its "Memorandum Opinion" holding that the State of Indiana through its Welfare Department had not complied with the provision of the Social Security Act, 42 U.S.C. Sec. 1396d (a) (4) (B) as of March 1, 1974. The Court permanently enjoined Defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them "from continu-

ing to administer EPSDT in violation of 42 U.S.C. Sec. 1396d (a) (4) (B) and the regulations established thereunder, 45 CFR 249.10 (a) (3) and further "Defendants are ordered to have a program of Early and Periodic Screening Diagnoses and Treatment (EPSDT) in effect in every county by July 1, 1974."

III.

The Case In the Seventh Circuit

The Seventh Circuit heard oral argument on September 13, 1974 and issued its decision of October 30, 1974 affirming the District Court's holding that;

> "The State of Indiana has failed to implement EPSDT as required by 42 U.S.C. Section 1396, 45 CFR 249.10 (a) (3)." Appendix A-5.

Further the Seventh Circuit refused to find that the sole remedy for Indiana's noncompliance with federal requirements was the reduction of federal payments to the State in accordance with 42 U.S.C. Section 603 (g) "with respect to quarters in fiscal years beginning after June 30, 1974." (Appendix A-18). On November 20, 1974 the Petitioners filed a "Petition for Stay of Mandate" in the Seventh Circuit seeking a stay of the Court's order pending appeal or the resolution of the Department of Health, Education and Welfare's Audit of Indiana's EPSDT program pending at that time and still unresolved. Stay was granted on November 22, 1974, and dissolved and mandate issued by the Court's order dated January 2, 1975.

REASONS FOR ALLOWANCE OF THE WRIT

The United States Congress provided a general penalty for the failure of a State to conduct its Aid to Families

with Dependent Children program in compliance with Federal Law and regulation. 42 U.S.C. Sec. 604 provides that in the event of a State's noncompliance the Secretary of Health, Education and Welfare has the authority to stop payment of all federal funds for the program. However, Congress exempted the State's failure to provide an acceptable EPSDT program from the penalty. Instead, Congress provided in 42 U.S.C. Sec. 603 (g) that in the event of noncompliance the Secretary of HEW could reduce State Aid to Families with Dependent Children (AFDC) funds by one percent. This is a drastic departure from the former penalty allowing complete cut-off of AFDC funds. In no other area of the AFDC Program, except family planning services (42 U.S.C. Sec. 603(f)) did Congress provide such a mild penalty. Because of this drastic difference Petitioners contend Congress intended the issue of compliance in the EPSDT program to be treated differently than all other areas of the AFDC program. Therefore, the provision of this specific and mild penalty is an indication that Congress intended the issue of compliance in the EPSDT program to be an administrative matter between HEW and the State and thereby deprived the Courts of the jurisdiction to order the State to institute an EPSDT program.

The Court relied upon *Rosado v. Wyman,* 397 U.S. 397, 420-421 (1970), in support of the proposition that the Court has jurisdiction for both declaratory and injunctive relief. At first blush it would be very easy for this Court to refuse to grant certiorari in that it would see the *Rosado* decision as dispositive of the issues raised in this petition. However, the *Rosado* case is distinguishable from the case for which certiorari is sought. In the *Rosado* case,

the compliance issue was one of the very many compliance issues which may arise under 42 U.S.C., Section 602(a), which statutory provision sets forth general requirements for states participating in the Aid to Families with Dependent Children Program. The Department of Health, Education and Welfare has authority to hold compliance hearings under 42 U.S.C., Section 604 when a deviation from the requirements of 42 U.S.C., Section 602(a) are in issue. Under 42 U.S.C., Section 604, the Department of Health, Education and Welfare may withhold total program funds from states which are out of compliance.

42 U.S.C. Section 603 (f) and (g) was enacted *after* the *Rosado* decision and addressed itself specifically to a very narrow and particularized aspect of the HEW—state administered assistance programs. The focus was on *administrative* action. The degree of specificity with which Congress addressed itself to the EPSDT Program made that issue distinguishable from all other possible compliance issues except family planning. This degree of narrow specificity distinguishes the case for which certiorari is sought from all the *Rosado* decision.

The highly specific nature of 42 U.S.C., Section 603 (g) can not be ignored. In *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946), this Court, in addressing itself to the subject of equity jurisdiction stated as follows:

> "Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a *necessary and inescapable inference,* restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown v. Swann,*

10 Pet. 497, 503. See also *Hecht Co. v. Bowles, supra,* 330." (Emphasis given.)

This statement was quoted with approval in *Mitchell v. De Mario Jewelry,* 361 US 288, 291 (1959).

It is respectfully submitted that the negation of district court jurisdiction is necessarily and inescapably inferred in 42 U.S.C., Section 603(g). By this statute, Congress, as heretofore pointed out, chose to treat an EPSDT Compliance issue in a very specific way different from all compliance issues except family planning, and Congress incorporated compliance with such program as a factor in the federal funds distribution formula to be applied by HEW as an administrative matter. No other compliance issue except family planning has been declared by Congress to be treated in such a specific manner. By application of 42 U.S.C., Section 603(g), a state has a choice of either implementing an EPSDT Program or having one percent of its federal funds taken away from its AFDC Program. If the court exercises its equity jurisdiction and orders the state to implement a different EPSDT Program, the state is deprived of its choice of taking the percent reduction. That choice is mandatory. 42 U.S.C. Sec. 603(g).

Moreover, it has been pointed out that HEW has conducted an audit of Indiana's EPSDT Program after the decision of the Court of Appeals below. If the decisions of the courts below are sustained, the administration of Indiana's vastly improved EPSDT Program will be vastly impeded by the program's supervision by two masters, HEW *and* the district court below. Such a scheme provides a background for counterproductive results which could not have been intended by Congress.

For these reasons Petitioners contend that the issue of a State's compliance with the requirements of EPSDT is a political question. In *Marbury v. Madison,* 1 Cranch 137, 164-166, 2 L. Ed. 60 (1803) Chief Justice Marshall expressed the view that the courts will not entertain political questions even though such questions involve actual controversies. The non-justiciability of a political question is founded primarily on the doctrine of separation of powers and the policy of judicial self-restraint. The relationship between the judiciary and the other branches of the federal government gives rise to the political question, and whether a matter has been committed by the Constitution to another branch of the government is decided by the Court. *Marbury v. Madison,* 1 Cranch 137, 164-166, 2 L. Ed. 60 (1803).

> "In determining whether a question falls within (the political question) category, the appropriatness under our system of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Coleman v. Miller;* 307 U.S. 433, 454-455, 59 S. Ct. 972, 982, 83 L. Ed. 1385. (1939)

See also, Wright, LAW OF FEDERAL COURTS, § 14, p. 45-48. The most definitive pronouncement by the United States Supreme Court on the issue of political questions was issued in the case of *Baker v. Carr,* 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 663 (1962). The Court stated as follows:

> "Prominent on the surface of any case held to involved a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without

> an initial policy determination of a kind clearly for the nonjudicial discretion; of the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Unless one to the formulations is inextricable from the case . . ., there should be no dismissal for nonjusticiability on the ground of a political question's presence." *Baker v. Carr,* 369 U.S. at 217, 82 S. Ct. at 710.

Most recently the doctrine of political questions has been used to refuse judicial determination of the legality of American involvement in Vietnam. See *Luftig v. McNamara,* 373 F. 2d 664, 126 U.S. App. D.C. 4, (D.C. Cir. 1967), cert. denied 387 U.S. 945, 87 S. Ct. 2078, 18 L.Ed.2d 1332; denial of cert. in *Mora v. McNamara,* 389 U.S. 934, 88S.Ct. 282, 19 L. Ed. 2d 287 (1967). The Seventh Circuit held in *Luftig v. McNamara* at 666 that matters of foreign policy are plainly the exclusive province of Congress and the Executive.

Petitioners contend that the distribution of AFDC funds is a matter in the exclusive province of Congress and that the issue of a State's compliance with EPSDT presents the potentiality of embarrassment from multifarious pronouncements on one question. HEW has audited the Indiana Department of Public Welfare and may, if it so chooses, impose a reduction of one percent of Indiana's AFDC funds. The Courts in this case have ordered the State of Indiana to implement an EPSDT program. These two remedies are drastically different and contradictory. For this reason Petitioners contend that 42 U.S.C. Sec. 603

(g) was enacted to provide a specific and exclusive penalty for the State's failure to institute an acceptable EPSDT program and thereby the Courts are deprived of jurisdiction on the basis of the political question doctrine from exercising jurisdiction to mandating the State to implement an acceptable EPSDT program.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and order of the Seventh Circuit.

Respectfully submitted,

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